71-1489

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No._____

PLASTILINE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PLASTILINE, INC.,
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NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Plastiline, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on February 15, 1972.

OPINIONS BELOW

The decision and order of the National Labor Relations Board, 190 NLRB No. 75 is reproduced in the Appendix to this petition at App. 4.[1] The opinion of the Court of Appeals, not yet reported, is reproduced in the Appendix to this petition at App. 1.

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[1] The Appendix to this Petition is separately paginated, and is referred to herein as "App."

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 15, 1972. A petition for rehearing was denied on March 21, 1972. This Court's jurisdiction is invoked under 28 USC 1254(1).

QUESTION PRESENTED

An employer, thirteen months after a union's certification, asserts doubt of the union's majority. The union refuses to prove its majority and the employer files a petition for an election with the National Labor Relations Board. The employer offers to continue to bargain conditioning the execution of the contract upon the union's proof of majority. Is the employer guilty of a refusal to bargain?

STATEMENT OF THE CASE

Plastiline, Inc., (hereinafter called the Company), is engaged in the manufacture of plastic pipe fittings at its Pompano Beach, Florida plant (A. 282).[2] Following a Board conducted election, the Broward County Carpenters District Council, United Brotherhood of Carpenters and Joiners of America AFL-CIO (hereinafter called the Union), was certified on May 13, 1969 as bargaining representative of the Company's employees (A. 297).

By December 17, 1969, the Company and the Union had met in a series of thirteen collective bargaining sessions (A. 54). Prior to the December session, agreement was reached by the parties on a contract (A. 333).

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[2] As used herein, "A" refers to the Appendix in the court below.

This contract was subsequently submitted by the Union to the employees of the Company on April 12, 1970, and was rejected by the employees (A. 30, 31).

At no time subsequent to the rejection of the contract did the Union request resumption of the negotiations (A. 334). During late May 1970, the Company desired to make certain changes affecting working conditions at its plant (A. 334). Consistent with the Company's bargaining obligation, the Company's attorney contacted the Union attorney regarding the changes and inquired as to whether the Union desired to meet and negotiate over them (A. 334). The Union attorney did not know if the Union wanted to engage in further bargaining and suggested that the Company attorney write him regarding this (A. 334).

On May 25, 1970, the Company attorney wrote the Union's attorney restating the Company's desire to make the proposed changes and inquired in writing as to whether the Union wished to negotiate over the changes (A. 234). The Union's attorney replied by letter of June 1, indicating the Union's desire to so negotiate (A. 235).

The Company attorney by letter of June 18, 1970 concluded arrangements for a June 23, 1970 meeting with the Union to discuss the Company's proposed changes (A. 236). In this letter, dated thirteen months aftr certification, the Company expressed doubt of the Union's majority status and urged the Union to come forward with proof of its majority at the scheduled meeting (A. 236).

At the June 23 meeting, the Company again expressed its doubt of the Union's majority status and asked the Union to come forward with proof supporting

its supposed majority (A. 235, 256). The Union refused, and in refusing, the Union attorney challenged the Company attorney to file an election petition with the Board saying: "Go file an RM or something." (A. 269, 270, 275).

On July 9, 1970, the Company wrote to the Union explaining its willingness to negotiate to a final argument conditioning the execution of the agreement upon proof of the Union's majority status (A. 237). The Company explained that it was going to file an Employer (RM) petition in an effort to properly resolve its doubts (A. 237). The Company concluded the letter by urging the Union to submit dates and times for future negotiations between the parties (A. 237).

Correspondence continued to be exchanged between the parties relative to setting up future meeting dates. The Company, as it had previously indicated, filed an Employer Petition with the Board on July 23, 1970 (A. 280). In response, the Union filed an unfair labor practice charge on July 28, 1970, alleging a refusal to bargain contrary to Section 8(a)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. §158(a)(5).[3] This charge had the effect of blocking the processing of the Company's petition. This charge was consolidated with an unrelated previous charge (A. 218), which had been filed and had reached the complaint stage.

On September 30, 1970, a Consolidated Amended Complaint was issued by the National Labor Relations Board alleging, in part, that the Company had refused

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[3] The relevant portion of Section 8(a)(5) reads:

"SEC. 8(a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

to bargain with the Union since June 12, 1970, by expressing doubt of the Union's majority status, by conditioning the execution of any collective bargaining agreement upon resolution of that doubt, and by engaging in certain acts through its Personnel Director which were designed to encourage employees to repudiate the Union (A. 219, 220, 221, 222, 223, 224).

The Company's answer to the complaint alleged, in part, that the requirement of good faith doubt as to majority status was not a correct legal standard (A. 228). The Company also denied that it engaged in acts designed to encourage its employees to repudiate the Union (A. 227, 228).

The National Labor Relations Board adopted the Trial Examiner's findings and conclusions and found that the Company had engaged in unfair labor practices (A. 403). The Board held that the Company had refused to bargain by asserting doubt of the Union's majority in bad faith (A. 307), and relied upon *U.S. Gypsum* and *Celanese Corp.* to support its conclusions (A. 307). The Board also found that the Company had violated Section 8(a)(1) of the Labor Management Relations Act of 1947, 29 U.S.C. §158(a)(1)[4] through actions of its Personnel Director (A. 310). The Board then ordered the Company to bargain collectively with the Union upon request (A. 311, 312).

The Fourth Circuit Court of Appeals upheld the Board's findings and required the Company to bargain collectively with the Union (App.).

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[4] The relevant portion of Section 8(a)(1) reads:

"SEC. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7;"

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH PRINCIPLES ENUNCIATED BY THIS COURT IN *GISSEL AND BROOKS*.

An employer after the expiration of a certification year, expresses doubt of a union's majority status and asks the union for proof of its majority. The union refuses and the employer then files a petition with the National Labor Relations Board seeking an election in order to resolve its doubts. At the same time, the employer informs the union that it is willing to negotiate conditioning the execution of an agreement upon the union's proof of majority. The union files an unfair labor practice charge alleging a refusal to bargain which blocks the processing of the employer's petition. As a result of the charge, the employer is found guilty of a refusal to bargain after the certification year of bargaining has expired, and is ordered to bargain with the union.

The above paragraph describes a situation which has occurred because the Court and National Labor Relations Board below applied principles which conflicted with this Court's decision in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969) and *Brooks v. National Labor Relations Board*, 348 U.S. 96 (1954).

This Court's decision in *Gissel* represented a reexamination of the principles underlying the imposition of bargaining orders by the National Labor Relations Board. *Gissel*, while emphasizing the irrelevancy of good faith in the imposition of a bargaining order, held that the proper test of the propriety of a bargaining order was whether:

> "the employer has committed unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority . . ." *National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575, 613-614 (1969).

Likewise, in questioning the Union's majority, the Company was mindful of this Court's decision in *Brooks v. N.L.R.B.*, 348 U.S. 96 (1954), wherein it was noted that the better practice was for an employer with doubts as to a certified incumbent union's majority status to keep bargaining and petition the Board for an election. Despite adherace to this practice as recommended by this Court, a bargaining order was imposed on the Company because it had not raised its doubts in good faith. Furthermore, this Court in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 594 (1969), stated "[A]n employer's good faith doubt is largely irrelevant" in determining the propriety of a bargaining order where the union's majority is questionable and an employer has refused to bargain. The Company is then in the anomalous position of having expressed its doubt of the union's majority in the manner sanctioned by this Court in *Brooks* and then having been found guilty of a refusal to bargain on principles which are contrary to *Gissel*.

The legal standards imposed on the Company by the Court and Board below were first announced by the Board in *Celanese Corporation of America*, 95 NLRB 664 (1951), where it was stated:

> " . . . [A]fter the certificate is a year old, . . . the employer can, without violating the Act, refuse to bargain with a union on the ground that it doubts the union's majority, provided that the doubt is in good faith." (95 NLRB 664 at 672)

The Company's actions were judged by a good faith standard, yet *Gissel* deems good faith irrelevant. While *Gissel* involved an initial organizational context, its teachings are not limited to that situation.[5] The argument has been voiced that the withdrawal of recognition after expiration of the certification year involves the competing consideration of assuring the stability of an established bargaining relationship.[6] Such an argument does not apply in the instant case. Here, there was no withdrawal of recognition and no subsequent refusal to negotiate. Rather, the Company was willing to continue to negotiate, conditioning the execution of a contract upon resolution of its doubt. Whatever stability may have existed in the bargaining relationship would have been preserved by the Company's proposed course of conduct.

Application of the good faith standard to post-certification year assertion of doubt has also placed an intolerable strain on Section 9(c)(1)(B) of the National Labor Relations Act. This strain has resulted from the Board's decision in *United States Gypsum Company,* 157 NLRB 652 (1966), wherein the Board required that an employer in petitioning for an election to question the continued majority of a previously certified incumbent union:

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[5] Indeed, in *Celanese Corporation of America, supra,* the National Labor Relations Board in first announcing the good faith standard to be applied after the expiration of a certification year noted the arguments against applying such a standard in that context and specifically stated:

> "And we find no reason in law or policy which calls for the conclusion that a good faith doubt of majority is no defense to a refusal to bargain *after* the certificate year any more than is true in cases where there is no certificate."

[6] This argument was advanced in *N.L.R.B. v. Frick Co.,* 423 F.2d 1327 (3rd Cir. 1970).

> "must demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status since its certification." (157 NLRB 562 at 656).[7]

United States Gypsum represented a sharp break from precedent and reversed a rule which had been in effect for seventeeen years. The Board in *Whitneys,* 81 NLRB 75 (1949), has previously held that an employer under Section 9(c)(1)(B) of the Act had an absolute right through an election petition to question the majority status of an incumbent union.[8]

In restricting an employer's right to file a petition and imposing a good faith requirement upon such filing, the Board in *United States Gypsum* reasoned as follows:

> "However, although the statute does not specifically grant the Board discretion to dismiss a petition where continued majority status is not validly challenged, neither does it prohibit the Board from doing so.[14] Further the legislative history states clearly that Section 9(c)(1)(B) was designed to give relief to those employers who have 'reasonable grounds for believing' that a union making a claim is not really the choice of the majority.[15] There is no indication that Congress in enacting that section contemplated the creation of a device by which an employer acting without a good-faith doubt of the union's status[16] could disrupt collective

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[7] Board citations in the *U. S. Gypsum Company* case made it clear that the Board's requirement in *Gypsum* was, in effect, a good faith requirement.

[8] *Whitneys* was cited by this Court in *Brooks* for the proposition that an employer could ask for an election one year after certification.

[14] See *Ray Brooks v. N.L.R.B.,* 348 U.S. 96, 104

[15] S. Rept. 105 on S. 1126, 80th Cong. 1st sess., p. 10; I Leg. Hist. 416 (1947) . . .

[16] Ibid; 93 Cong. Rec. 1911 (1947) (Remarks of Senator Morse), II Leg. Hist. 983; 93 Cong. Rec. 4153 (1947) Remarks of Senator Murray), II Leg. Hist. 1042."

bargaining and frustrate the policy of the Act favoring stable relations.

(157 NLRB 652 at 656)

The above quotation from *United States Gypsum* is somewhat ironic. The section in the above quotation which is modified by footnote 15 was cited in *Whitneys* in support of the opposite position that an employer was not inhibited from filing a petition under the circumstances (see *Whitneys,* 81 NLRB 75 (1949) fn. 8). Additionally, the material referred to in footnote 16 of the Board's quotation above is the Senate Minority report objecting to the inclusion of Section 9(c)(1)(B) and the objections of Senator Morse and Senator Murray and their protests against the enactment of Section 9(c)(1)(B). Indeed, Senator Murray, whose comments are relied upon by the Board, submitted an amendment[9] to Section 9(c)(1)(B) which was not accepted.

The Board in its *United States Gypsum* decision indicated that it was overturning precedent in order to secure uniformity of treatment for an incumbent union which was faced with a petition filed by an employer.[10] However, the Board was completely oblivious to the clear language of Section 9(c)(1)(B) of the Act which states:

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[9] Legislative History of the Labor-Management Relations Act of 1947, Vol. 2, p. 1443, Sec. 203(b).

[10] In *United States Gypsum, supra,* the Board noted that when a petition was filed by an employer, an incumbent union had the choice of proceeding to an election or filing a refusal to bargain charge which blocked the petition and subjected the employer to a "good faith" inquiry as to assertion of doubt. Accordingly, the Board sought to bring about uniform treatment by requiring that an employer petition be supported by objective considerations which were raised in good faith.

"9(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in Section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists, shall provide for an appropriate hearing upon due notice."

The language of Section 9(c)(1)(B) is clear — there is no requirement that an employer filing a petition support it with evidentiary proof of loss of majority status. The Board in *United States Gypsum* obtained by construction and administrative interpretation and regulation what the Senate minority was unable to obtain by amendment and by substitute legislation. *United States Gypsum* represents the anomaly of the legislative views of the minority Senators becoming the law. Such action by the Board was predicated on the premise that an employer's doubt of an incumbent union's majority status, however raised, must be in good faith. As such, the *United States Gypsum* decision compromised the clear language of 9(c)(1)(B) and muted this Court's advice in *Brooks*.

Gissel's deemphasis of good faith has erased the underlying premise of *United States Gypsum* and *U. S. Gypsum* should be reversed and balance restored to the Act by interpreting Section 9(c)(1)(B) as Congress intended it to be interpreted. Imposition of a good faith standard through a Section 9 representation procedure as well as through a Section 8 unfair labor practice procedure has meant that an employer cannot properly

resolve his doubt as to a certified incumbent union's majority by filing a petition and continuing to bargain. A good faith standard emphasizes an employer's motives and does not judge an employer's conduct with reference to the actual impact of the employer's coduct upon union majority status or the election process. At least one Court of Appeals[11] has expressed its concern with the difficulties inherent in the application of good faith standard to an employer's conduct in questioning a union's majority status. Adherence to *Gissel* principles which stress the irrelevancy of an employer's good faith doubt and place emphasis on the nature of the employer's unfair labor practices and their actual impact upon the majority status of the union or the election process will allow an employer to effectively resolve his doubts. At the same time, *Gissel's* emphasis on the effect of an employer's unfair labor practices on a union's majority or the election process relative to the imposition of a bargaining order would serve to sufficiently safeguard an incumbent union's position. Such adherance would also return Section 9(c)(1)(B) to the interpretation intended by Congress.

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[11] *Fremont Newspapers v. N.L.R.B.*, 436 F.2 665 (8th Cir. 1970). In *Fremont*, the Company had committed minimal 8(a)(1) violations while asserting doubt of an incumbent union's majority status, and the Board had held that the 8(a)(1) violations had negated good faith. The Court of Appeals for the Eighth Circuit in deciding the case noted:

> "[T]he difficulties in the application of a rigid 'good faith' standard to the exceptional situation in which the independent unfair labor practices have had little or no actual effect upon the union majority status or the election process." 436 F.2d 665 at 671.

II. THE DECISION BELOW PERPETUATED A CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEALS

Assuming arguendo the relevancy of good faith, the Fourth Circuit Court of Appeals, by affirming the Board's findings that the Company was guilty of a refusal to bargain, implicitly perpetuated a conflict in principle between the various circuits regarding the legal standards to be applied to an employer's assertion of doubt of a union's majority after the expiration of the certification year.

The legal standards in this area were first enunciated by the National Labor Relations Board in *Celanese, supra.* The Board in *Celanese* noted that the majority status of a union was presumed to continue for one year from the date of certification. This presumption was a conclusive one. After the certification year had elapsed, the presumption became rebuttable and an employer could so rebut if evidence was introduced demonstrating that *in fact* a union did not represent a majority at the time of the employer's refusal to bargain. *Celanese* introduced another concept: an employer could also refuse to bargain after the expiration of the certification year on the grounds that it doubted a union's majority, provided that the doubt was in *good faith.* In *Celanese,* the Board painstakingly differentiates between good faith doubt of majority status and loss *in fact* of majority status.[12] Thus, *Celanese* held that the assertion of a

[12]In a footnote of the *Celanese* decision, the Board announced that its "good faith" concept had evolved in earlier Board decisions—*United States Gypsum Company,* 90 NLRB 964 (1950) and *Toolcraft Corp.,* 92 NLRB 655 (1950). The Board in referring to *Toolcraft* concluded that the language and structure of that case made it clear that once a good faith doubt finding had been made, it was unnecessary for the Board to determine whether a union in fact had majority status.

good faith doubt of a union's majority status after the expiration of a certification year was sufficient to escape a bargaining order even if it was shown that a union *in fact* enjoyed a majority status.

The broad general principles enunciated by the Board in *Celanese* have been adopted by the various Circuit Courts of Appeals. However, decisions of various Circuits have pointed to a conflict in the application of the *Celanese* principles. This conflict is limited to the situation where an Employer has come forward in *good faith* with evidence sufficient to raise serious doubt as to a union's majority status and sufficient to rebut the presumption that a union enjoys majority support. In such a situation, the employer has not proven *in fact* that the union does not have a majority but rather has relied on good faith doubt. In this situation, according to the Board's decision in *Celanese,* if evidence is introduced proving that the union *in fact* has a majority, this evidence will not result in a bargaining order issuing since the employer had satisfied the good faith standard, and the evidence of majority status *in fact* need not be considered. The Board's reasoning in this situation is upheld by a number of circuits who have framed their good faith discussions in terms of refusals to bargain without violating the Act.[13]

The Board and Court's reasoning in *Celanese* in regard to this point has been impliedly rejected by the Court of Appeals for the District of Columbia in *Lodges*

[13]See for example: *N.L.R.B. v. Rish Equipment Co.,* 407 F.2d 1098 at 1100-1101 (4th Cir. 1969) wherein the Fourth Circuit said: "Accordingly, where a certification is a year or more old, an employer may refuse to bargain *without violating the Act,* if, but only if, he in good faith has a reasonable doubt of the Union's continuing majority." Identical language is found in *N.L.R.B. v. Frick Co., supra* (3rd Cir. 1970). (Emphasis added)

1746 and 743 Int. Ass'n. of Machinists and Aerospace Workers v. N.L.R.B., 416 F.2d 809 (D.C. Cir. 1969). In that case, the Court of Appeals framed the discussion in terms of presumptions and shifting burdens of proof.[14]

The Court of Appeals for the District of Columbia made it clear that if a union introduced evidence that it *in fact* represented a majority, a refusal to bargain charge would stand despite the fact that an employer had raised its doubts in good faith and had initially rebutted the presumption.[15]

The conflict in principle is clear. Various circuits hold that an assertion of doubt in good faith which is sufficient to rebut the presumption of a union's majority will preclude a refusal to bargain finding even if evidence is introduced which proves that a union *in fact* represents a majority. The District of Columbia Circuit rejects such a view and holds that good faith doubt of a union's majority may not be enough to avoid a bargaining order if there is subsequent evidence in the record that the union in fact represents a majority.

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[14]The Court of Appeals for the District of Columbia stated: "Thereafter, the presumption continues but becomes rebuttable upon a showing of 'sufficient evidence to cast serious doubt on the union's continued majority status.' At that point, the burden shifts to the General Counsel to prove that, on the critical date, the union *in fact* represented a majority of the employees." 416 F.2d 809 at 811-812 (Emphasis added).

[15]In *Lodges 1746 and 743 Int. Ass'n of Machinists and Aerospace Workers v. N.L.R.B.*, the Court concluded:

"In sum, the Company's showing was sufficient to overcome the presumption by casting 'serious doubt' upon the Unions' majority status. Since the record lacks evidence that the Unions in fact enjoyed such status, the refusal-to-bargain finding is without support and enforcement must be denied." (416 F.2d 809 at 814)

Failure to grant this Petition will mean that an employer who asserts doubt of a union's majority after the expiration of the certification year will continue to be subjected to a good faith standard contrary to this Court's teachings in *Gissel*. The continued imposition of such a good faith standard in part through the Board's *United States Gypsum* decision will further deny an employer his statutory rights as enunciated in Section 9(c)(1)(B). Failure to grant this Petition will also perpetuate a conflict in principle between the various circuits regarding the legal standards to be applied to an employer's assertion of doubt of a union's majority after the expiration of the certification year.

CONCLUSION

For the reasons set forth hereinabove, certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

By _____
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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 71-1740

Plastiline, Inc.,

Petitioner,

v.

National Labor Relations Board,

Respondent.

On Petition for Review of an Order of the National Labor Relations Board.

Argued January 7, 1972 Decided February 15, 1972.

Before Bryan and Russell, Circuit Judges, and Young, District Judge.

Granville M. Alley, Jr., (James G. Brown, and Alley, Rock and Dinkel on brief) for Petitioner, and Frank E. Vogl, Attorney, National Labor Relations Board, (Peter G. Nash, General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Leonard M. Wagman, and Stuart R. Rosenblum, Attorneys, National Labor Relations Board, on brief) for Respondent.

PER CURIAM:

The National Labor Relations Board in its order of May 17, 1971, 190 NLRB No. 75, found that Plastiline, Inc., a manufacturer and seller of plastic pipe fittings, had violated Section 8(a)(1) of the Act, 29 USC 158(a)(1), as well as Section 8(a)(5) and (1), 29 USC 158(a)(5). The breaches of the former consisted of attempts to persuade its employees to reject and abandon their certified collective bargaining agent, the Broward County Carpenters District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. The offenses under Section 8(a)(5) and (1) comprised ill-faith assertions of doubt as to the union's continued status as the employees' representative and a refusal to bargain for a labor-management contract.

Here the company, conceding the Section 8(a)(1) infractions, seeks review and vacation of so much of the Board's order as required it to bargain. Section 10(f), 29 USC 160(f). A cross-application is presented by the Board for enforcement of its order directing the employer to bargain and to cease and desist from violating Section 8(a)(1). Section 10(e), 29 USC 160(e).

While the parties' evidence is conflicting, we cannot say that the Board's findings and order are without substantial support. Universal Camera Corp. v. NLRB, 340 US 474 (1951). Hence the order will be upheld.

Order enforced.

190 NLRB No. 75

D--5101
Pompano Beach, Fla.

(8)

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PLASTILINE, INC.

Respondent

and

Case 12--CA--4755

CHARLES A. McWHORTER

Charging Party

PLASTILINE, INC.

Respondent

and

Case 12--CA--4905

BROWARD COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL--CIO

Charging Party

DECISION AND ORDER

On January 28, 1971, Trial Examiner Owsley Vose issued his Decision in the above-entitled proceedings, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that Respondent had not engaged in certain other unfair labor practices and recommended that the allegation pertaining thereto be dismissed. Thereafter, the

Respondent filed exceptions to the Trial Examiner's Decision with a supporting brief and a motion to reopen the record.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, brief, motion, [1] and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that

[1] Respondent has filed a motion to reopen the record and requests that the Board direct a further hearing. As a ground therefor, Respondent argues that the Trial Examiner "impliedly credited" the General Counsel's contention that the April 17, 1970, meeting was a negotiating session. Categorizing the meeting as a negotiating session is immaterial to our decision in that both sides made their positions known at the meeting. Respondent also asserts as grounds for its motion the Trial Examiner's alleged finding that it was guilty of a refusal to bargain on or about April 12, 1970, which is outside the scope of the complaint. We find no indication of such a finding in the Trial Examiner's Decision. Accordingly, Respondent's motion is denied.

the Respondent, Plastiline, Inc., Pompano Beach, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C. MAY 17 1971

John H. Fanning, Member

Gerald A. Brown, Member

Ralph E. Kennedy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

TXD-28-71
Pompano Beach, Fla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

PLASTILINE, INC.,

Respondent

and

Case No. 12-CA-4755

CHARLES A. McWHORTER,

Charging Party

PLASTILINE, INC.,

Respondent

and

Case No. 12-CA-4905

BROWARD COUNTY CARPENTERS DISTRICT
COUNCIL, UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, AFL-CIO

Charging Party

Jack T. Brellis of Miami, Fla., for the General Counsel.
Leo P. Rock and Samuel Leonard (Law Offices of Granville M. Alley, Jr., Chartered), of Orlando and Tampa, Fla., for the Respondent.
Charles A. McWhorter of Fort Lauderdale, Fla., appearing for himself.
Warren P. Conary of Fort Lauderdale, Fla., appearing for Broward County Carpenters District Council.

TXD-28-71

TRIAL EXAMINER'S DECISION

Statement of the Case

OWSLEY VOSE, Trial Examiner: These cases were heard at Miami, Florida, on October 20 through 26, 1970, pursuant to charges filed on January 28 (by McWhorter) and July 28, 1970 (by Broward County Carpenters District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called the Union). A complaint was issued by the Regional Director in Case No. 12-CA-4755 (the McWhorter case) on May 18, 1970. Thereafter this case was ordered consolidated with Case No. 12-CA-4905 and a consolidated amended complaint was issued on September 30, 1970. The consolidated amended complaint alleges in substance that the Respondent discharged McWhorter on January 26, 1970 because of his union and grievance-presentation activities, in violation of Section 8(a)(3) and (1) of the Act, refused to bargain collectively with the Union on and after June 12, 1970, in violation of Section 8(a)(5) and (1) of the Act, and engaged in certain alleged acts of interference, restraint and coercion in violation of Section 8(a)(1) of the Act.

Upon the entire record, 1/ my observation of the witnesses, and after considering the brief filed by the Respondent, I make the following:

Findings and Conclusions

I. The Business of the Respondent

The Respondent, a New York corporation, is engaged at Pompano Beach, Florida, in the manufacture and sale of plastic pipe fittings. During the year preceding the issuance of the consolidated amended complaint the Respondent shipped more than $50,000 worth of finished products to out-of-State destinations. Upon these facts, I find, as the Respondent admits, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Broward County Carpenters District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

1/ The motions of the General Counsel and the Respondent to correct the record are hereby granted. These motions are included as Trial Examiner's Exhibits 1 and 2 in the folder containing the Respondent's exhibits.

III. The Unfair Labor Practices

A. The Respondent's Discharge of Charles McWhorter in Alleged Violation of Section 8(a)(3) and (1) of the Act

1. McWhorter's work record prior to the organization of the Union

McWhorter was classified as a mold maker and worked in the Respondent's toolroom. At the time of his termination he had worked for the Respondent about 6 years. A mold maker must be a highly skilled tool and die maker and necessarily works to extremely close tolerances. McWhorter had been a tool and die maker for over 30 years and was in the top labor grade for mold makers. He was assigned to operate the largest and most expensive machine in the toolroom, an automatic boring mill. Frank Mayer, who was foreman over the toolroom for all except the last 4 or 5 months of McWhorter's employment, testified that prior to 1969, McWhorter was an "excellent worker" and that he had on occasions urged other employees to try to "do as well" as McWhorter.

2. Sequence of events leading up to McWhorter's suspension

An employee sought the aid of the Union in organizing the Respondent's employees early in 1969. Both the Union and the Company waged vigorous campaigns, distributing numerous releases among the employees. In one of the Company's letters to the employees, dated April 11, 1969, the Respondent's president, Bryce Batzer, stated as follows: "We do not want to see a union come into the plant. We are going to do what we legally can do to prevent it." In some of the Union's leaflets, President Batzer was referred to in very uncomplimentary terms.

The Union achieved sufficient support among the employees by March 19, 1969, to petition the Board's Regional Office for an election, and the election was later scheduled for May 5.

About 2 weeks before the election an antiunion circular was mailed to the homes of the employees. It bore the statement at the bottom "Published & Paid for by NUS. committee," which was unknown to the employees at the plant. This circular was referred to in a discussion in the plant between Bryce Batzer, the president of the Respondent, and McWhorter. McWhorter objected to the mailing of the circular to the employees, asserted that "you've got everybody in the plant upset," and accused the Respondent of being responsible for the mailing of the circular to the employees' homes. Batzer in effect denied that the Respondent was responsible for the circular, whereupon McWhorter challenged Batzer to print a retraction if the Respondent were not responsible.

Batzer had another conversation with McWhorter at his machine a few days before the election. Both men objected to the literature which the other side was putting out during the preelection campaign. In the course of the conversation McWhorter stated that since Batzer had let it be known that he was going "to fight" the Union, he should consider McWhorter as one of his opponents.

Sometime before the election McWhorter was involved in an incident with Theodore Huber, who was assistant foreman in the toolroom. Huber at various times had occasion to speak to employees, including McWhorter, about returning to work promptly at the end of their break periods. McWhorter apparently resented this. On one occasion, while protesting Huber's asserted harassment of employees to return to work, McWhorter stated to Huber, according to the latter's credited and undenied testimony, "You and the other guy are the two biggest assholes in this shop." A few moments later McWhorter called Huber a "Nazi" and accused the Respondent of running the plant "like the Nazis do."2/ Huber immediately reported the incident to Foreman Mayer.

The Union won the election by a vote of 139 to 91, with 5 challenged ballots. On May 13, 1969, the Regional Director, on behalf of the Board, certified the Union as the exclusive representative of all of the Respondent's employees in the appropriate unit.

The day after the Union won the election President Batzer called Joe Mankowitz, a business agent of the Union, and apologized to him for having ordered him off company premises on the day before. In the course of the conversation which ensued, Mankowitz, after assuring Batzer that together they could work out a contract which would be beneficial for all concerned, stated, according to Batzer's credited and undenied testimony, that "If we are going to have any problems it's going to be over that little s.o.b. McWhorter, and I just want you to know we are not going to war over him."

About 4:30 p.m. on May 15, 1969, Robert Goode and Charles McWhorter, who were later elected president and vice president of the Union, left the toolroom in which they worked and entered the main plant in which the Respondent's production is carried on. The toolroom is in a separate building about 30 feet away from the main building. According to their testimony, they had completed their workday and were going to get a cup of coffee in the vending machine area. Goode testified that the coffee machine in the toolroom was not in working order.

2/ Huber is of German nationality.

To reach the vending machine area the two men had to go down an aisle past production employees at work (the production employees work in three shifts). Plant Engineer Herman Schweizer stopped the men as they were entering the vending machine area and told them that they were not to use the area for recruiting purposes and to leave immediately, asserting that it was contrary to Company policy for men to remain on the premises after their workday had ended. The two men nevertheless pressed forward and obtained coffee for themselves, at the same time asserting that they had a right to be there. 3/ At this point General Foreman Ron Gavel joined the group and they all sat down at a table. McWhorter objected that they were being "treated like mules" and "pushed around." Later McWhorter, while nodding in the direction of two female box stitching machine operators, asked Gavel if he had "taken any action with regard to the second shift foreman and the pigs he had working for him." Gavel told McWhorter that it was none of his business. McWhorter rejoined that if Gavel did not take any action "the union would when it got in." When Gavel told Goode and McWhorter to leave, they insisted that they had the right to remain as long as they wanted to. Gavel reported this incident to Personnel Manager Don King the next day. 4/

About June 1, McWhorter stopped President Batzer as he was passing by McWhorter's machine and said in an admittedly loud tone of voice, "Bryce, where in the hell is my raise." McWhorter went on to say that he was the only one of five in the same category who had not received a raise. When Batzer said that he had his reasons, McWhorter replied that it was "quite obvious" what his reasons were, explaining that he was "the only one of the five that was a union employee." The above quotations are from McWhorter's credited testimony. According to Batzer's testimony which I credit, on this occasion McWhorter "started off on a tirade" about the ability of his foreman, Frank Mayer, claiming that Mayer had "cost the Company millions of dollars" and suggesting that Batzer would do well to get rid of Mayer.

3/ McWhorter referred to a letter to the employees from President Batzer which he asserted gave them the right. One paragraph of a letter mailed to the employees on March 7, 1969, states as follows:

> The second situation concerns the new machine shop building. A statement has been made that all employees except those working in the machine shop are to be kept out of the building. This is not true. Any employee is free to move about the buildings providing it doesn't interfere with his assigned duties.

4/ The foregoing findings about the vending area incident are based upon my reconciliation of the sometimes sharply conflicting testimony of the various participants in the incident.

In the latter part of May, the Union held an election of officers, stewards and trustees. As above indicated, Robert Goode was elected president of the Union and McWhorter was elected vice president. Ray Vick was elected recording secretary.

Sometime early in June 1969, after the election of union officers, President Batzer had a conversation with Ray Vick, the recording secretary of the Union. According to Vick, Batzer, after mentioning the fact that Vick was an officer in the Union, stated that he "sure wished that they could have had an independent union in there rather than the Carpenters, or any outside union." Batzer went on to say that he had a new position in mind and was considering Vick for it, and indicated that he would receive more favorable consideration for the job if he would drop his union affiliation. Batzer's version of the conversation is that Vick volunteered that the employees intended to use the Carpenters to help them organize, but once the Union was organized to ask the NLRB for leave to disassociate themselves from the Carpenters and form a company union. Regarding Vick's testimony as to a job offer, Batzer testified that he asked Vick if he would be interested in a supervisory job in the molding department and that Vick turned it down because "it would put him in a poor light with the employees he worked with to organize the union." Batzer denied telling Vick that his union affiliation "was holding him back" from progressing in the Company. In my opinion it is implausible that Vick would have stated to Batzer that the employees proposed to take advantage of the Carpenters and then drop the organization later on. Furthermore, Batzer exhibited a poor memory at various points in his testimony. Having observed both witnesses on the stand, I credit Vick's version.

Shortly thereafter a negotiating committee was appointed by representatives of the District Council and affiliated organizations within the Carpenters International Union. The committee included several employee-members, among whom were Union President Goode and Vice President McWhorter and also several union officials, namely Joe Mankovitz, a business representative of the District Council, Warren Conary, a representative of the Florida State Council of Carpenters, and John Sheppard, a representative of the International. Although Goode and McWhorter acted as the chief spokesmen for the Union in the bargaining meetings which followed, Goode was informed at the time he was appointed to the negotiating committee that his role was subject to the authority of the District Council and its affiliates

The Union negotiating committee, with Union President Goode and Vice President McWhorter acting as co-chairmen, met with representatives of the Respondent for the purpose of collective bargaining 13 times in the June to December 1969 period. The first meeting was held on June 10. Attorney Granville Alley, Jr., was the

Respondent's spokesman in the negotiations. The negotiations culminated in an agreement between the union negotiating committee and the Respondent. The record fails to show when this agreement was reached, except that it was some time before April 12, 1970, when the employees at a union meeting voted to reject the agreement.

When Union President Goode was asked at the hearing to describe McWhorter's conduct at the bargaining meetings, he answered as follows:

> Mr. McWhorter was very aggressive when the attorney, Mr. Alley, would bring forth a proposal from the company and if it was distasteful to Mr. McWhorter, he would raise many objections to the point of an obvious feeling by Mr. Alley of resentment.

3. The circumstances surrounding McWhorter's suspension on January 26, 1970

The chain of incidents precipitating McWhorter's suspension commenced on January 22, 1970. At 4:48 p.m. that day Everett Moore, the foreman of the toolroom, testified that on this occasion he observed McWhorter not working and that his toolbox was locked at 4:48 p.m. The buzzer, which signals time to quit work, does not sound until 4:55 p.m. Moore then asked Theodore Huber, the assistant foreman, why McWhorter's box was closed. Huber said he did not know. According to Moore, when McWhorter observed Moore looking at him, he began to pretend he was busy and started cleaning up his machine. Moore then noted on a form which the Respondent uses, headed "Written Warning," the following with respect to McWhorter:

> I saw his tool box locked at 4:48 p.m. I did not say anything to him today.

Moore then had the form inserted in McWhorter's personnel folder. The practice of Moore and his predecessor, Mayer, with respect to the use of these warning slips is discussed below.

The next afternoon, Friday, January 23, McWhorter started cleaning up his machine about 4:50 p.m. As found above, McWhorter operated the larges machine in the toolroom, and it produced the most dirt and debris. At 4:50 p.m. Foreman Moore noticed that McWhorter's toolbox was again closed and locked. Moore told Assistant Foreman Huber that he was going to have to speak to McWhorter about it.

McWhorter testified as follows concerning Moore's conversation with him on this occasion:

> . . . I started cleaning up at 4:50, and my machine was still running. It was in the middle of a cut. So, I proceeded to let it run and was putting away my tools and things, and all of a sudden I closed the lid on my tool box.
>
> Immediately Mr. Moore came over and pointed to the tool box and said, "I do not want to see that tool box closed until 4:55."
>
> I said, "It's my own personal tool box." I said, "I don't know of any reason why I shouldn't do that."
>
> He said, "Furthermore, I want your machine running until 4:55," and I pointed out to him that the machine was still running. He ignored that and went back to his tool box.
>
> I argued that there had never been a rule that I ever knew that said a man couldn't close his tool box. Some people left their tool boxes, kept them closed all day long. They never did open them.
>
> I said, "Why are you picking on me." I said, "Why all these new rules always start with me."
>
> He said, "Furthermore, I don't want you out there at that coffee truck until 10 minutes until 10:00," and again I emphasized, "Why are you picking on me."
>
> I said, "Look at the men in the wash room already washing up." He ignored this and by that time the buzzer had rang and it was time to quit. So, I went in and washed up.

Moore testified as follows regarding this incident:

> I walked over and I told Mr. McWhorter, as I stated here, that I didn't want his box being closed before the 4:55 bell, or to stop work before the 4:55 bell, because if somebody come to the front office, if Mr. Batzer would come through and saw him not working and closed up I would be checked on.

> So Mr. McWhorter got quite indignant with me at this time and said why was I picking him out and what had changed the rules.
>
> I said, "Mr. McWhorter, I do not make the rules here." I said, "I have to enforce them, and if you are not satisfied with the rules you will have to see Mr. Jones in personnel."

Moore added that McWhorter was "very, very perturbed and angry" on this occasion. Moore testified, contrary to McWhorter, that McWhorter's machine was not running when he spoke to him on this occasion. I credit Moore's testimony in this regard. McWhorter's statement on grievances which was read to Director of Industrial Relations Jones just 2 days later indicates that Moore approached McWhorter after McWhorter had shut down his machine. This statement of grievances is discussed more fully below.

Later that day Moore prepared and had placed in McWhorter's personnel folder another warning slip stating as follows regarding this incident:

> At 4:50 I saw his box locked so I went to him and told him I didn't want his box closed until 4:55 because if somebody from the front office came in and saw it I would be checked on it. He got very indignant about it so I notified all the assistant foremen that from here on no body would be allowed to go to the lunch wagon etc. before the bell rang. I notified personnel of this matter.

McWhorter was not informed that this slip had been placed in his personnel folder.

Shortly after the conversation with Moore, McWhorter went into Moore's office and asked him to make an appointment for McWhorter to see Director of Industrial Relations Walter Jones on the following Monday. Moore agreed to do so. Moore got up to leave just as McWhorter started to leave the office. Both men reached the doorway about the same time, with McWhorter slightly in the lead. At this point McWhorter raised his forearm to a horizontal position with his elbow forward and nudged Moore in his ribs, temporarily blocking his passage. Moore told McWhorter, as the latter testified, "Don't you push me." McWhorter denied doing do and followed Moore out the door. 5/

5/ The findings in the above paragraph are based upon my resolution of the somewhat conflicting versions of McWhorter and Moore concerning this incident. Although McWhorter denied attempting to block Moore's passage, I believe he was still angry at the reprimand which he received from Moore a few minutes earlier and either deliberately or subconsciously gave vent to his anger in this manner.

On Sunday night, January 25, McWhorter prepared a 16½-page statement which he planned to read to Director of Industrial Relations Jones at the conference which was being arranged for the following day. In this statement McWhorter listed numerous instances of asserted harassment and discrimination against him by certain of the Respondent's supervisors because of his official position in the Union and also instances of alleged favoritism towards nonunion employees. The statement concluded with a request for papers on which to file a grievance under the procedure which he asserted the Respondent had adopted. 6/

The meeting with Jones was arranged for 1:30 p.m. on Monday, January 26. McWhorter arrived at Jones' office with a tape recorder in an open manila folder. McWhorter first requested that Robert Goode, the president of the Union, be present at the meeting. Jones, after making a telephone call, denied this request. At this point Jones asked McWhorter if he had a tape recorder among his papers. McWhorter admitted that he had. Jones stated that he was sorry but he could not allow McWhorter to record this session. According to McWhorter, the following then ensued:

> I said, "Why not? You have tape recorders. I said, "You have one on your desk." I said, "You have several more within the room here."

When Jones denied this, McWhorter asserted, as he testified, "Everybody in the plant knows that you record all of the sessions and conversations that take place in this room." McWhorter proposed that they move to another room, leaving their recorders in Jones' office. Jones reluctantly agreed.

After settling themselves in another office, McWhorter read the statement in its entirety to Jones, with only a few interruptions from Jones. In the statement McWhorter accused the Respondent of engaging in "a planned program" of "harassment" against Union employees and "favoritism" towards nonunion employees in an effort to encourage union employees, particularly himself, to quit. This, McWhorter asserted, would give the Respondent "a free hand to ride herd on the rest of the employees." In the statement McWhorter reveals himself as being overly confident of his abilities and qualities as an employee and highly critical of three of the Respondent's supervisors, Herman Schweizer, chief engineer, Moore and Huber, the foreman and

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6/ The Respondent had in fact distributed among its supervisors a document setting forth a grievance procedure but it had not notified the employees of the existence of the procedure. McWhorter had heard the Respondent's proposed grievance procedure being discussed in negotiating meetings and had previously received a copy of the document containing the grievance procedure from an assistant foreman.

assistant foreman in the toolroom. McWhorter's statement as a whole is highly antagonistic to the Respondent and it openly reveals his conviction that the Respondent would not consider his grievances in good faith. As indicated above, McWhorter concluded his presentation with a request for forms on which he could submit his grievances. Jones indicated that the Respondent had no such forms and suggested that they return to his office. Jones called Walter Legere, his assistant, and Moore, McWhorter's foreman, into the office. Then Jones stated that he was particulary interested in the toolbox incident of the preceding Friday. This was the last specific instance of alleged discrimination and harassment covered by McWhorter in his presentation to Jones. McWhorter offered to drop this complaint if Jones would consider the remaining incidents. Jones replied, "I am particularly interested in that last day there."

McWhorter reread his notes concerning this incident. Jones asked Moore, "Is that the way it happened?" Moore said, "Yes, that's about right." Then the following ensued, according to McWhorter's testimony:

> He said to Mr. Moore, "Wasn't there something else you told me this morning about that incident."
>
> Mr. Moore said, "Oh yes." He said "As we started to go through the door Mr. McWhorter pushed me."
>
> I guess I jumped up from my seat, or something, and I said, "Wait a minute. What are you fellows trying to pull off here."

Jones thereupon excused Legere and Moore and after they had left the office, McWhorter again asked for the papers upon which to file his grievance. When Jones again stated that he had no such papers, McWhorter said, "Well, I guess I've wasted my time" and started to leave.

McWhorter testified regarding the remainder of this meeting as follows:

> Mr. Jones said in a loud voice, "Now, just a moment. You sit down here. I'll tell you when to leave." He said, "I resent you coming into my office with a tape recorder and attempting to record my voice. This is an invasion of my privacy." He said, "I resent this," and he said, "Therefore, I'm going to suspend you."

Jones then took McWhorter back to the toolroom. The two men passed a group of toolroom employees having coffee as they walked towards McWhorter's work station. As they did so McWhorter shouted, as Jones testified, "I just got fired . . . for doing nothing." Jones

remonstrated with McWhorter for disrupting production and announced, McWhorter's testimony continues, "I'll give you ten minutes to get off the company property." As McWhorter started putting away his tools, Jones told him "Don't take your tools. . . . If you take your tools I'll consider that you have quit." In McWhorter's words, the following then occurred:

> I said, "Mr. Jones, I'm not quitting." I said, I want that perfectly clear, I'm not quitting," but I said, "I have had this entire lot of tools, $2,000 worth stolen just a few months back." I said, "If you will take the responsibility for these tools I'll leave them, but if you will not take the responsibility I must take them."
>
> He said, "I will not assume the responsibility." So, I continued to pack up my tools. He said, "If you are not out of here within five minutes I'm going to call the guard."
>
> . . . I kept packing my tools. I have lots of them, two big roll away chests full of tools. I looked up, and here's a guard standing there. . . .
>
> The guard said, "I'm sorry, but you are going to have to leave," and I said, "Well, I will if you will just give me a few moments more." I said, "You are not going to have any trouble with me."
>
> I completed -- just threw things together and closed the door and rolled the chest out through the door, and the guard helped me. I left the building, and that was the end of that.

The foregoing findings concerning the meeting between McWhorter and Jones on January 26, 1970, are based upon my reconciliation of the sometimes conflicting testimony of McWhorter and Jones. I found both McWhorter and Jones apt to overstate matters and have had to scrutinize their testimony carefully in an effort to ascertain where the truth lies. The findings recited above, based in part upon McWhorter's testimony and to a lesser degree upon Jones', are consistent with what I believe to be the logic of the situation.

A few minutes after McWhorter was suspended Jones told Robert Goode, the president of the Union, that McWhorter was suspended for being "insubordinate." When Goode asked what Jones meant, Jones replied, as Goode testified, "Well, we find that he is very loud, very boisterous and he does not respond with our direction."

Around breaktime on the afternoon of McWhorter's suspension Jones explained to the assembled toolroom employees that McWhorter was suspended pending an investigation. When a few employees asked questions concerning the reasons for the suspension, Jones stated that he did not have all of the facts in his possession and would inform them more fully later.

That same afternoon Goode had the following conversation with Foreman Moore, as Goode credibly testified:

> I had asked Mr. Moore what -- for what cause Mr. McWhorter was suspended and what were the results; what was being done about it. And Mr. Mc -- Mr. Moore said to me that the only difference between he and Mr. McWhorter was the fact that he had closed his tool box prior to the five minute bell that goes off -- five minutes wash up bell. And I raised the objection and I accused Mr. Moore of singling out Mr. McWhorter because most of the employees in the tool room, by the nature of their work, closes their tool box at any given hour during the day. On most occasions, a lot of tool boxes are not even opened during the day. There are many days when I go through without even putting a key to my tool box and no objection is ever raised.
>
> **TRIAL EXAMINER:** You told all this to Mr. Moore?
>
> **WITNESS:** Yes, sir.
>
> And Mr. Moore said well, he had not noticed these things, that he had brought to Mr. McWhorter's attention that he had closed his tool box early.

4. McWhorter's discharge on February 20, 1970

On February 9, McWhorter went to the Respondent's office and sought to talk with Jones. However, Jones was confined to a hospital at the time and McWhorter talked to Assistant Personnel Manager Legere. McWhorter first told Legere that he wanted to make arrangements so that his insurance would not expire. Then McWhorter said that the Unemployment Commission had sent him in and wanted to know the disposition of his case. Legere stated that the matter was in Jones' hands and that he would have Jones call him when he returned. After about a week later, after Jones had returned, McWhorter called Jones again. Legere took the call, explaining that Jones was busy. McWhorter asked Legere on this occasion "how much longer my suspension is going to be for." Legere replied that this was strictly between McWhorter and Jones and again stated that he would have Jones call him. The next day Jones called McWhorter but said he still had not completed his investigation, and that he would call the following day.

On the next day, February 20, Jones called and said he was converting McWhorter's suspension into a discharge. When asked for the reason, Jones replied that there were numerous reasons, including insubordination and pushing a supervisor, and referred to the various incidents in which McWhorter had been involved in the 6 years of his employment. The foregoing is McWhorter's recollection of the reasons given him by Jones for his discharge. Jones recalled a few additional reasons given McWhorter at this time, such as fighting on the job and other incidents which were documented in his personnel folder, constant use of foul and abusive language and inability to get along with his fellow employees. Jones concluded with the statement that he "just felt that we couldn't tolerate it any longer." I credit Jones' testimony concerning these additional reasons for McWhorter's discharge.

5. The warning slips previously given McWhorter

In mentioning the fighting on the job and other incidents which were documented in McWhorter's personnel folder, Jones was referring to the warning slips which over the years had been placed in McWhorter's personnel folder.

Before even briefly covering the content of these warning slips, it is necessary to explain the Respondent's procedure with respect to the issuance of these slips. Although these slips are headed at the top "WRITTEN WARNING," and contain at the bottom the words "Repeated Written Warnings could lead to further disciplinary action or discharge," except in the comparatively rare instances in which the employee is shown the slip and asked to receipt for it, the employee is not informed that a warning slip has been prepared. Under the Respondent's practice, such a warning is considered an oral warning even though the supervisor may have given the employee only the mildest sort of reprimand in discussing the incident with him, or, as in the case of the incident involving McWhorter on January 22, may not even have mentioned the incident to the employee at all. In cases of serious misconduct or drastic violations of the Respondent's rules, the Respondent shows the warning slip to the employee and asks him to sign it. On such occasions the employee is deemed to have received a written warning.

At the trial in this case the Respondent introduced into evidence 16 warning slips which had been placed in McWhorter's personnel folder at various times commencing in 1967. But two were issued before the union campaign began. Only three of these 16 warnings were what the Respondent regarded as written warnings, given for more serious misconduct or derelictions of duty. One of these, issued on May 10, 1967, stemmed from a fight with Ed Czulinski in the shop, for which McWhorter received a 3-day layoff. The next resulted from McWhorter's leaving the toolroom without permission on June 12, 1969, about a month after the Union won the election. For this offense

McWhorter was given a 2-day layoff. The warning slip issued by Foreman Mayer on this occasion, which McWhorter refused to sign, states that "When confronted with charge in front of Mr. King [the then personnel manager] Mr. McWhorter used abusive language." Mayer credibly testified that McWhorter called him "a lousy Christian 7/ and a liar and a poor foreman" on this occasion. The third written warning given McWhorter was based upon work errors and his failure to follow instructions in machining a certain part.

Of the 13 oral warnings placed in McWhorter's folder, the last two covered the incidents which precipitated McWhorter's suspension on January 26. Four of these 13 were based upon misconduct of one sort or another, such as harassing an employee to join the Union, removing a company letter from the bulletin board, and doing personal work in the shop 2 days in a row after being reprimanded on the first occasion. The remainder were based either on work errors or taking excessive time on jobs. Some of the work errors required costly repair jobs.

The Respondent established that it had discharged nine employees in the preceding 12 months, including one for insubordination, and that all of them had fewer oral or written warnings in their personnel folders than did McWhorter. The General Counsel made no attempt to prove the contrary or to differentiate their cases from McWhorter's.

6. The Respondent's contention concerning McWhorter's discharge; conclusion

The Respondent, while not denying that it was fully aware of McWhorter's very active role in the union movement, contends that the accumulation of complaints against McWhorter, culminating in the incident in Moore's office on January 23, in which McWhorter pushed Moore in the ribs with his elbow -- which the Respondent characterizes as a "flagrant act of insubordination" -- was the real reason for McWhorter's discharge and that McWhorter's union activities were not a substantial and motivating factor in his discharge.

In passing upon this contention it should be borne in mind that at the time of McWhorter's discharge the relations between the Respondent and the Union were amicable. At that time the parties had bargained together in good faith over a 6-month period and the prospects for reaching a satisfactory agreement were excellent. (An agreement satisfactory to the negotiating committees was in fact reached not long thereafter.) The Respondent is charged with no unfair labor practices in the 6-month period antedating McWhorter's discharge. While

7/ Mayer testified that he had deep religious convictions and that on previous occasions he had urged his employees to go to church.

the General Counsel relies on several statements of President Batzer which indicate hostility to the Union, the latest of these was uttered in June 1969, approximately 8 months before McWhorter's discharge, long before the series of bargaining meetings was successfully concluded.

While McWhorter had previously been an excellent tool and die maker, his work deteriorated after the Union came into the picture.

The record shows that McWhorter had a very short temper, was quick to give vent to his anger, and frequently used abusive language to his superiors. All in all, McWhorter was a very difficult employee to handle and caused problems with other employees, as well as supervisors. While I do not regard McWhorter's pushing of Moore on Friday, January 23, as seriously as does the Respondent, the Respondent could fairly treat this as a further challenge to its authority. This incident, together with the incident in Jones' office just before McWhorter's suspension in which McWhorter attempted to make a tape recording of the discussions there and in which he arrogantly and presumptously presented his statement of his grievances, could reasonably be regarded as the "last straw," as Jones in effect testified. In my opinion it was the accumulation of complaints against this irascible employee, rather than McWhorter's union activities which caused the Respondent, after reviewing McWhorter's entire record, to convert his suspension into a discharge. Such a discharge is lawful, and the allegations of the complaint based upon McWhorter's discharge will be dismissed.

B. The Respondent's Refusal to Bargain Collectively with the Union in Violation of Section 8(a)(5) and (1) of the Act; further Acts of Interference; Restraint and Coercion in Violation of Section 8(a)(1) of the Act.

1. Introductory statement

The complaint challenges the Respondent's conduct commencing on June 12, 1970, after the certification year had expired, and does not raise any question regarding the Respondent's fulfillment of its bargaining obligations prior to the expiration of the certification year on May 13, 1970. Hence, even though the Respondent's conduct in the last part of the certification year might be regarded as inconsistent with the requirements of Section 8(a)(5) of the Act, no finding of an unfair labor practice may be based thereon because of the failure of the complaint and the proceedings had thereon to apprise the Respondent that the legality of its conduct during this period was being challenged. However, since the Respondent's defense to the refusal-to-bargain allegations of the complaint is that after the expiration of the certification it had reasonable grounds for doubting the Union's continuing majority status, and since such a claim can be

relied on only if it is made in good faith, it is necessary to discuss certain conduct of the Respondent towards the end of the certification year which casts light on the Respondent's good faith in asserting doubt as to the Union's majority status.

2. The Respondent's conduct within the certification year

As stated above, the Union was certified by the Board as the exclusive bargaining representative of the Respondent's employees on May 13, 1969. In the period from June to December 1969, the respective bargaining committees met on 13 occasions and subsequently reached agreement on the terms of a proposed collective-bargaining contract. As found above, Attorney Granville Alley, Jr., was the Respondent's principal spokesman in the negotiations and Union President Goode and Vice President McWhorter were the principal spokesmen for the Union.

However, on April 12, 1970, when the proposed contract was submitted to union members at a union meeting for ratification, the members rejected the contract. The next day Union President Goode, with the approval of John Sheppard, a representative of the International who was also on the union negotiating committee, informed Director of Industrial Relations Jones of the rejection of the contract. Pursuant to Sheppard's instructions, Goode at the same time urged Jones to arrange meetings to discuss the provisions of the contract which concerned the employees.

A day or so later President Batzer commented to Goode that he understood that Goode and his "forty man executive committee" 8/ had rejected the contract. After Goode replied that the contract had been rejected at "a duly representative meeting," Batzer asked Goode what he was concerned about in the contract. Goode suggested that if Batzer and his representatives "would sit down with us" he thought that "we could work something out." Goode mentioned that he had talked to Jones about "getting together" and Batzer acknowledged that he was aware of this.

On Wednesday, April 14, Jones called International Representative Sheppard and informed him that Goode had requested a meeting with the Respondent to discuss the employees' objections to the contract. Jones, as he testified, told Sheppard that he had asked Goode to present an agenda ofthe terms to be discussed at the meeting and if this was satisfactory with his superiors, he would arrange the meeting. However, Jones stated that he wanted it understood that "this was not to be construed as a negotiating meeting." On Thursday afternoon

8/ This was apparently a reference to the number of employees whom Batzer had heard had attended the contract ratification meeting.

Goode turned over to Jones a list identifying the areas of the contract which the employees felt needed to be improved. Eleven items in all were covered on the list.

Messrs. Goode and Vick representing the Union met with President Bryce Batzer, his father, Milton Batzer, the treasurer and the founder of the Respondent, and Director of Industrial Relations Jones on April 17. Either Goode or Vick discussed each of the items contained on the agenda. Company representatives asked questions about various items. The meeting lasted 2 1/2 to 3 hours. At the end of the meeting, as Jones testified, President Batzer after commenting that the Respondent would take the matters raised under advisement, stated, "[W]e will discuss this with our attorney, and we'll get back to you."

About a week or 10 days later, not having heard anything further from Jones, Goode asked Jones in his office as to the Respondent's disposition of the questions which he had raised concerning the proposed contract. Jones stated that he had no further information at that time, but that he and his superiors were considering their requests. Thereafter, Goode spoke to Jones on several occasions about various matters including the resolution of the differences between the parties concerning the proposed contract. On one occasion early in May, Jones told Goode, as the latter testified, that he "had given the necessary information to our attorney, Mr. Alley, to have the legal terminology worked out on some of our contract problems." During one of these conversations about the middle of May, Jones told Goode that he had "some goodies for the employees" respecting the "wage performance schedule," "vacations," and "holidays," if Goode would approve of them. Goode's answer was that he "thought that within a couple of sessions in negotiating we could work this out." Jones stated that he "certainly did not want to go into another year of long and drawn out negotiations" and that "he felt that it would be better if we could work something out between us." The foregoing quotations are from Goode's undenied testimony.

Despite Goode's repeated requests for information concerning the disposition of the Union's objections to the contract, 9/ the Respondent did not at any time thereafter give any answer to the questions which Goode and Vick had raised about the proposed contract.

9/ Goode made a further request of Jones for the Respondent's answer to the Union's objections to the proposed contract about the middle of July, as Jones himself testified.

3. The Respondent's conduct after the expiration of the certification year

a. The initial correspondence between the parties

The certification year expired May 13, 1970. The next communication from the Respondent to the Union was a letter sent by Attorney Alley to Thomas Dorsey, an attorney for the Union, on May 25, 1970. The text of the letter is as follows:

> I was very sorry to learn today that the union was not going to execute the contract which the negotiators had agreed to during the course of collective bargaining because the Union membership had rejected the contract.
>
> The Company would like to make certain changes in its wages, hours and working conditions but before doing so would like to know whether or not your organization desires to be advised of these changes and to negotiate in regard to them.
>
> If we do not hear to the contrary from you on or before June 5, 1970, we will presume that you do not desire to be notified or to negotiate concerning these matters.

Attorney Dorsey answered Alley's letter on June 1, as follows:

> The Union still represents the employees at Plastiline, Inc. and is desirous of negotiating relative to any changes in its wages, hours and working conditions.
>
> Please contact me and we will arrange to meet at a mutually convenient time.

b. The Company's June 18 challenge of the Union's majority status; the June 23 meeting

After a telephone conversation between Attorneys Alley and Doresey on June 18, a meeting between representatives of the Union and the Respondent's representatives was arranged for the evening of June 23. This was done at Alley's request. Alley confirmed this arrangement by letter dated June 18. The letter concluded with the following paragraph:

We have received your earlier letter in which you state the Union still claims to represent a majority of the employees. We must inform you that we do not believe that your organization represents a majority of the employees at Plastiline, Inc., and would expect you to come forward with proof of this majority status at the scheduled meeting.

At the meeting on June 23 Attorney Alley and Jones represented the Respondent. Attorney Dorsey, Representative Warren Conary of the Florida State Council of Carpenters, Union President Robert Goode and two other employees represented the Union. The purpose of the meeting, as was made clear by Alley, was to enable the Respondent to discuss with the Union two changes in existing working conditions, provided the Union offered fresh proof of its majority status or would agree to do so in the near future. Attorney Dorsey took the position, in effect, that the Respondent was still bound by the certification, declined to furnish fresh proof of majority status, and insisted that the Respondent bargain further regarding the terms of a contract. Alley refused, saying that the Respondent had proposed the meeting only for the purpose of discussing the two changes, and refused also to set a date for future bargaining meetings. In justification of this position Alley asserted that the Respondent had evidence that the Union no longer represented a majority and indicated the kind of evidence the Respondent was relying upon.

Although there was considerable bickering between the spokesmen for the parties thereafter their positions remained the same until the end of the meeting, with the Respondent taking the position that the Union no longer represented a majority of the employees and the Union insisting that it was still entitled to rely on the previous certification.

c. Director of Industrial Relations Jones' acts of interference, Restraint and coercion

About the middle of June 1970, Director of Industrial Relations Jones, after expressing doubts about the Union's continuing majority status, told Union President Goode that he thought that the employees would "be better off without a big union" and asked him to consider urging the employees to reject the Union and to support a decertification election. Jones added that if Goode succeeded in persuading employees to abandon the Union he felt sure that Goode could convince the outside union officials to drop their organizing activities. 10/

10/ The foregoing findings are based on Goode's credited testimony. As found below, Bedsole also testified concerning Jones' effort to get her to start a decertification petition. Jones after first admitting that he had made a statement to Goode to the effect that he thought that the employees would be better off without a big union later denied this, and also the remainder of the conversation attributed to him by Goode. I was more favorably impressed by Goode's reliability as a witness than Jones'. I credit Goode's testimony upon which the above findings are based.

Frances Bedsole had a conversation with Jones when she went into the office on July 1 to discuss her return from a leave of absence. During the conversation Jones, after mentioning that the contract which the employees had rejected was better than she thought it was, asked her, as Bedsole testified, if she did not think "that we should get rid of the International and form an independent union." Jones further suggested at this time that "she talk to the people about . . . an oral contract and get them to accept one." Bedsole refused, telling him that she thought the proposal was ridiculous." Then, after a discussion about the Union's present majority standing, Jones according to Bedsole, asked her if she would "start a petition for decertification" so as to resolve the question of the Union's current majority. In the course of this conversation, which lasted about 45 minutes, Jones also stated that "the Union was holding us back from receiving raises and other benefits such as shortening the workday of certain departments." 11/

In early August, Jones had another conversation with Goode in which Jones suggested that Goode consider taking a position as his assistant to conduct a training program. Goode said that he was not interested. Jones went on to say that his first interest was the good of the majority of the employees and that he thought that Goode should have the same interest in the employees. Continuing, Jones stated, as Goode testified, "I urge you to use your influence on these employees to consider what we refer to as a company union to draft up some kind of an oral agreement, something that could be worked out and be more favorable for the people." 12/

On August 11, Jones told Recording Secretary Ray Vick, in effect, that he could further his advancement in the Company if he took a position favoring an independent union in the plant. 13/

11/ Jones, in essence, denied making the statements attributed to him by Bedsole. Bedsole's testimony was so full of details that I am convinced that she had a better recollection than Jones, who was hazy about some aspects of this conversation. I credit Bedsole's version.

12/ The above findings are based upon Goode's testimony. As found above, Bedsole testified about a similar suggestion made to her by Jones. Jones recalled certain aspects of the conversation but denied making any mention of forming an independent union during the conversation. I credit Goode's testimony about this conversation.

13/ This is Vick's testimony. Jones could not recall whether the subject of unions came up during this conversation. He did deny stating that union affiliation was holding up Vick's progress in the Company. As found, above, both Goode and Bedsole testified to statements made to them by Jones regarding the formation of an independent union. Under all the circumstances I credit Vick's testimony in this regard.

d. The final correspondence between the parties

Following the June 23 meeting an exchange of letters took place between Attorney Alley and either Attorney Dorsey or Representative Conary of the Florida State Council of Carpenters, commencing with a letter from Alley to Dorsey on July 9. In this letter Alley stated the Respondent's intention to file an RM petition (an employer petition seeking an election to determine the exclusive bargaining representative of its employees, if any) and offered to continue bargaining providing that the execution of any contract be conditioned upon the Union's making a fresh showing of majority status. In the Union's response dated July 17, 1970, the Union reiterated its position that the May 13, 1969, certification was still binding upon the Respondent and that no further proof of majority status was required. In the succeeding letters the parties' positions remained essentially unchanged and no further bargaining meeting resulted.

On July 23, 1970, the Respondent filed with the Board's Regional Office an RM petition.

Certain aspects of Alley's letters to the union representatives deserve mention. On page 2 of Alley's letter of July 21, 1970, to Conary he states as follows:

> . . . As to paragraph 4 of your letter, Mr. Conary, we have no contract demands from you in our hands as none of the Union representatives have submitted any to us either in writing or during any official negotiating session. So as to make the record clear, we had agreed upon a contract which was submitted to the employees for ratification on April 12, 1970, and turned down by those few employees present at that meeting. Since that time neither you nor your Union has made any request to reopen negotiations, nor have you or your Union submitted to the Company any new proposals upon which we can negotiate.
>
> You and I both know that only one official negotiating session has been held between the Company and the Union since April 12, 1970. That session was held on June 23, 1970. That meeting was called by me.

In Alley's letter of July 31, 1970, to Conary the following appears:

> . . . we also have bargained with you in good faith at all times which you requested during the course of the certification year in an effort to reach agreement on a contract. In fact, we agreed on a contract, but that contract, as you know, was rejected by Plastiline employees at a meeting held for that purpose on April 12, 1970. Since that time, you have not made any other effort to negotiate with me on the matter of a new contract.
>
> * * *
>
> It would also speed the progress of future negotiations if you took the trouble to submit to us a new statement as to the Union's position inasmuch as the agreement previously reached has now been rejected. We have no idea what new position, if any, your Union has taken.

In answer to this and a similar claim made in Alley's July 21 letter, Conary wrote back on August 5 in part as follows:

> . . . If you will check with Mr. Jones and the Company, you will find that he and the Company have been informed of our position on the rejected contract and the changes desired. The changes were presented a few days following the rejection of the agreement.

Finally, in Alley's letter to Conary dated August 7, 1970, states in part as follows:

> . . . The Company has met with your Union each and every time your Union has requested to negotiate. Not only has the Company met to negotiate, agreement was reached on a complete contract. For the record, you simply have not pursued negotiations in any diligent manner since September, 1969. After the contract was rejected on April 12, 1970, your Union did not request a single meeting. The only meeting that was held was held between Mr. Goode and several Company officials on Company property. It was the intent of all present that such was not to be a negotiating meeting, but was merely for discussing some of the reasons why the employees refused to ratify the contract submitted to them on April 12.
>
> * * *

Finally, I should make it clear that the Company has not received any new and official Union position. The meeting to which you make reference in the final paragraph of your letter was held on April 17, 1970. At that meeting it was understood by all present that the meeting was not a negotiating session, but just a meeting through which Mr. Goode and Mr. Vick informed the Company as to the reasons underlying the employees' refusal of the contract. This is the same meeting to which I have made reference above. Eleven points were discussed at that meeting. No official Union position was presented.

Mr. Conary, we both know that it was customary in our negotiations to have official positions presented in writing to the other party so that the record could be kept straight. We did not receive such a position from you following the April 12 rejection.

3. Conclusions concerning the Respondent's refusal to bargain collectively

As found above, the Respondent bargained collectively in good faith up until the time the respective negotiating committees reached agreement on the terms of a proposed contract sometime prior to April 12, 1970. But from the time the employees voted to reject the proposed contract the Respondent adopted a wholly different approach.

Upon being informed by Union President Goode of the rejection of the contract, the Respondent acquiesced in a meeting to consider the objections to the proposed contract, but insisted that this meeting, which was held on April 17, was not to be considered an "official" negotiating meeting. While President Bryce Batzer, Treasurer Milton Batzer, and Director of Industrial Relations Jones listened to the Union's presentation of the employees' objections to the proposed contract for over 2 1/2 hours and discussed various of the points raised by the Union, they refused to commit themselves on any point. Attorney Alley, who had previously been the Respondent's principal spokesman in the negotiations, was not present at the meeting on April 17. At the end of the meeting President Batzer stated that the Respondent would communicate with its attorney about the matters raised and report back to the Union. This is the testimony of the Respondent's own witness, Jones.

Despite this statement by the Respondent's president to Union Officers Goode and Vick, both members of the union negotiating committee, the Respondent never did give the Union any answer to the objections stated at the meeting. Goode's prodding of Jones for an answer about 10 days later was to no avail. Also ignored were Goode's subsequent requests for information regarding the differences between them.

Instead the Respondent did nothing with respect to its bargaining obligation in the almost 4 weeks remaining in the certification year. Thereafter, the Respondent took the position that the Union no longer represented a majority and refused to bargain further unless the Union furnished fresh proof of its majority status, or would agree to do so promptly.

The Respondent's first move after the certification year expired was Attorney Alley's letter to Attorney Dorsey dated May 25, 1970. In this letter Alley totally ignored the fact that Union President Goode had fully explained the Union's objections to the proposed contract to the Respondent's top officials about a month earlier, had kept after Jones thereafter for an answer, and was awaiting a statement of the Respondent's position. Instead Alley proceeded on the unwarranted assumption that the Union was no longer interested in representing the employees and appears to have been merely seeking confirmation of this fact. In the letter Alley stated that he was "very sorry to learn today that the Union was not going to execute the contract." While the statement may be technically accurate, the implication of this statement is that Alley had just been informed of the rejection of the contract over a month earlier and of the subsequent discussions between the parties. For the reasons discussed in the note below, I cannot believe this to be the case. 14/ The reason for Alley's dissembling of this manner is not quite clear. Whatever may be the reason it is consistent with the approach taken thereafter by the Respondent in its relations with the Union, i.e., of treating the communications between Goode and Vick and the Respondent's top officials at the April 17 meeting as though they never happened, or at least as not representing official positions of the Union casting an obligation on the Respondent to respond. This approach was foreshadowed by the Respondent's insistence that the April 17 meeting not be regarded as an official negotiating meeting.

14/ As found above, Director of Industrial Relations Jones testified that President Batzer stated at the end of the April 17 meeting that he would discuss the matters raised with the Respondent's attorney and report back. Early in May, Jones told Goode that he had given Alley the necessary information to enable him to work out the legal terminology covering some of their contract problems. It would be contrary to the normal practice between client and attorney in these bargaining situations for the Respondent's top officials not to have promptly informed Alley, the Respondent's attorney and principal spokesman in the negotiations, of the developments following the employees' rejection of the proposed contract. And it would have been clearly inconsistent with the Respondent's obligations under Section 8(a)(5) of the Act for the Respondent not to have communicated this information to its attorney.

The next formal communication between the parties was Alley's letter to Union Attorney Dorsey of June 18 in which he challenged the Union's majority status. The meeting of June 23 which followed merely confirmed the fact that the Respondent was taking the position that it would require fresh proof of majority status from the Union before the Respondent would participate in further negotiations.

In Alley's letter to Representative Conary dated July 21, he stated that the Respondent had received no contract demands from the Union since the April 12 meeting "either in writing or during any official negotiating session." Later in the letter Alley stated that the Union had not made any request to reopen the negotiations or offered any new proposals for negotiation. In Alley's letter to Conary dated July 31, Alley states that since April 12 Conary had made no effort to negotiate with the Respondent regarding a new contract. Included in this letter is the further statement that "We have no idea what new position, if any, your Union has taken." In Alley's letter to Conary dated August 7 he reiterated that the Union "did not request a single meeting" after the contract was rejected on April 12 and that "No official union position was presented" at the April 17 meeting.

The foregoing excerpts from Alley's letters to the Union make it abundantly clear that the Respondent has taken the position that the requests of Union President Goode for a meeting to discuss the Union's objections to the proposed contract, that the statements of Goode and Vick to the Respondent's top officials at the April 17 meeting concerning the objections to the proposed contracts, and that Goode's subsequent efforts to obtain the Respondent's answer to the Union's objections are of no significance and do not raise any obligation on the Respondent's part to respond thereto. For obviously if these actions of Goode and Vick are taken into account it simply is not true, as Alley repeatedly stated in his letters, that the Respondent has not at any time since the April 12 meeting received any request from the Union to reopen the negotiations or received any new proposals for negotiation. In view of the fact that Union President Goode and Recording Secretary Vick spent over 2 1/2 hours at the April 17 meeting discussing with the two Batzers and Jones the Union's objections to the proposed contract, I am wholly at a loss to understand counsel's statement that "We have no idea what new position, if any your Union has taken."

The Respondent had no valid reason for treating Goode's actions in requesting a meeting to discuss the Union's objections to the proposed contract, his statements of position at the April 17 meeting, and his subsequent requests of Jones for the Respondent's answer to the Union's objections as not representing official union action. Goode was a member of the official union negotiating committee and he served as one of the main spokesman for the Union at the negotiating meetings. Having attended the meeting at which

the contract was rejected and having heard the discussions there, Goode was well equipped to voice the employees' objections to the contract. There is no suggestion in the record that Goode in presenting the Union's objections was acting contrary to the authority of the Union.

The Act does not allow either of the parties to bargaining negotiations the prerogative of determining who shall be the official spokesman for the other or the manner in which communication shall be had. Yet in taking the position that Goode's actions were not official union actions the Respondent was attempting to exercise this very prerogative.

The Respondent's action in failing to respond within a reasonable time to Goode's statement of the Union's position regarding the Respondent's proposed contract was inconsistent, in my opinion, with the fulfillment of the Respondent's obligations under Section 8(a)(5) of the Act. Goode's repeated requests for an answer to the Union's statement of position, even without the Respondent's acquiescence therein, were sufficient to cast upon the Respondent the burden of taking the next step in the negotiations, i.e., of responding in some manner to the Union's objections to the proposed contract or seeking clarification thereof. This, the Respondent failed to do.

The Respondent's sole defense to the refusal-to-bargain allegations of the complaint is that it believed that the Union no longer represented a majority of the employees in the appropriate unit, a belief which the Respondent asserts is supported by the "objective considerations" detailed in its brief. It is true, as the Respondent states, that after the end of the certification year "an employer may lawfully refuse to bargain " "if it can show by objective facts that it has a reasonable basis for believing that the Union has lost its majority status since its certification." United States Gypsum Company, 157 NLRB 652, 655. However, as this case makes clear, for this defense to be available, the employer must be acting in good faith and must have refrained from any conduct tending to dissipate the union's majority status. Gypsum case, 157 NLRB, at 656. See also Celanese Corp., 95 NLRB 664, 672; Laystrom Mfg. Co., 151 NLRB 1482, 1483-1484, set aside on other grounds, 359 F. 2d 799 (C.A. 7); N.L.R.B. v. Gulfmont Hotel Co., 362 F. 2d 588, 589, 592 (C.A. 5); N.L.R.B. v. Little Rock Downtowner, Inc., 414 F. 2d 1084, 1090-1091 (C.A. 8); Terrell Machine Co., 173 NLRB No. 230, p. 3 and cases cited in footnote 5 thereof.

The evidence, in my opinion, establishes that the Respondent was not acting in good faith in asserting a doubt of the Union's continuing majority status. The Respondent was not acting in good faith when it refused to treat Union President Goode's requests for a meeting, his statement of positions at the April 17 meeting, and his

subsequent requests for the Respondent's answer to the objections voiced by him at the April 17 meeting as official union action. While Goode may not have had the authority to bind the Union to the terms of a collective-bargaining contract, he clearly had the authority to act as its spokesman. There is no legal basis for the Respondent's failure to treat him as such. Indeed, had the complaint contained an allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by its conduct in failing to make any response to Goode's statement of position at the April 17 meeting and his repeated requests for an answer, such conduct, which occurred before the certification year expired, might have justified a finding of a refusal to bargain collectively.

Had the Respondent fulfilled its statutory obligations in the final weeks of the certification year and discussed with the Union its objections to the proposed contract, the parties might possibly have reached an agreement and thus would have been avoided any defections from the Union resulting from dissatisfaction that no contract had been arrived at.

After the Respondent asserted its alleged doubt of the Union's majority status, it continued to take the unwarranted position in its letters to the Union that Goode was not an official spokesman for the Union and that hence it had no obligation to respond to any of his requests, andit continued to assert that the April 17 meeting was not an official negotiating meeting.

I am convinced in view of the Respondent's entire course of conduct commencing with the employees' rejection of the proposed contract on April 12, that the Respondent's manner of handling the April 17 meeting -- its insistence upon the understanding that the meeting was not an "official" negotiating meeting, the Respondent's willingness to proceed in the absence of Attorney Alley, and the failure of the Respondent's top officials to commit themselves regarding any part of the Union's objections -- and the Respondent's subsequent failure, within the remainder of the certification year, to take any action with respect to Goode's statement of position regarding the proposed contract were parts of a strategy contrived by the Respondent to delay resolution of the differences between the parties as to the terms of the proposed contract until such time as it would be free to question the Union's majority status. The Respondent's subsequent challenge of the Union's majority status and its continued insistence upon the unfounded position that Goode did not speak for the Union and hence could not raise any obligation on its part to respond were part and parcel of the Respondent's scheme to avoid further bargaining with the Union. The adoption of such a scheme is manifestly incompatible with good faith dealing with the Union.

Director of Industrial Relations Jones' efforts commencing about the middle of June to induce three members of the union negotiating committee to drop the Union, to start a decertification petition, or to consider an oral contract with an independent union further evidence the Respondent's failure to act in good faith in its relations with the Union.

In view of all of the foregoing evidence I conclude that the Respondent was not acting in good faith in questioning the Union's majority status commencing on July 18, 1970. Accordingly, under the authorities cited above, the Respondent's defense that it had reasonable grounds for believing that the Union had lost its majority status since its certification fails. The Union's majority status must be deemed to continue at least for a reasonable period after bargaining relations between the Respondent and the Union have been reestablished.

In the view of this case which I have taken, I do not reach the further question whether the factors relied upon by the Respondent as justifying its doubt of majority status constitute the kind of "objective considerations" which the Board has held must support a claim of this nature.

4. Conclusions concerning Respondent's interference, restraint and coercion

As found above, about the middle of June, Director of Industrial Relations Jones asked Union President Goode to persuade employees to reject the Union and support a decertification election. On July 1, Jones made a similar request of Frances Bedsole, a member of the union negotiating committee. In the conversation with Bedsole, Jones blamed the Union for the failure of the employees to receive certain benefits, although it was the Respondent's failure to bargain collectively with the Union in good faith which was responsible for the employees' failure to receive the benefits in question. Later on, after offering Goode a transfer to a managerial position, Jones urged Goode to persuade employees to accept an oral agreement with an independent union as an alternative to a contract with the Union. Still later Jones told Recording Secretary Vick in effect that his prospects for advancement in the Company would be enhanced if he favored an independent union.

Jones' requests and statements to these three union officials, which were aimed at inducing them to abandon the Union and advocate among their fellow workers the formation of an independent union -- requests which on two occasions were accompanied by veiled promises of benefits -- constituted interference, restraint and coercion of employees in the exercise of Section 7 rights, and therefore violated Section 8(a)(1) of the Act.

Conclusions of Law

1. By its action commencing about the middle of June 1970, in requesting employees to persuade their fellow workers that they abandon the Union, Broward County Carpenters District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and support a decertification election, in requesting employees to persuade their fellow workers to accept an oral agreement with an independent union as an alternative to a contract with the Union, in making veiled offers of benefits to employees to induce the requested action, and in falsely blaming the Union for the employees' failure to receive certain benefits, the Respondent has interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, thereby engaging in unfair labor practices in violation of Section 8(a)(1) of the Act.

2. All production, maintenance, warehouse and shipping department employees, all truckdrivers, tool and die employees, machinists, stockroom employees, laborers, helpers, apprentices, plant clerical employees and leadmen at the Respondent's plant at Pompano Beach, Florida, excluding all other employees, including all office clerical employees, expediters, guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

3. At all times since May 13, 1969, the Union has been and now is the exclusive certified representative of all employees in the above-stated appropriate unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

4. By its actions stated in paragraph 1 above and by asserting doubt of the Union's majority status in bad faith and refusing on and after June 18, 1970, to bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit stated in paragraph 2 above, the Respondent has thereby engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by its conduct after the certification year expired, my Recommended Order will direct that the Respondent cease and desist from such conduct and from like and related forms of interference, restraint,

and coercion. Affirmatively, my Recommended Order will provide that the Respondent, upon request, bargain collectively with the Union as the exclusive representative of all employees in the aforesaid appropriate bargaining unit.

Upon the foregoing findings and conclusions and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

RECOMMENDED ORDER 15/

The Respondent, Plastiline, Inc., Pompano Beach, Florida, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith with Broward County Carpenters District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive representative of all employees in the appropriate unit stated below.

(b) Requesting employees to persuade their fellow employees that they abandon the above-named labor organization and support a decertification election or that they accept an oral agreement with an independent union as an alternative to a contract with the above-named labor organization.

(c) Making offers of benefits to employees to induce them to take the action stated above.

(d) Falsely blaming the Union for the employees' failure to receive certain benefits.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

15/ In the event no exceptions are filed to this Recommended Order as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and Recommended Order herein shall, as provided by Section 10(c) of the Act and in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and order, and all objections thereto shall be deemed waived for all purposes.

(a) Upon request, bargain collectively in good faith with the above-named labor organization as the exclusive representative of all employees in the appropriate unit stated below with respect to wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement:

> All production, maintenance, warehouse and shipping department employees, all truck drivers, tool and die employees, machinists, stockroom employees, laborers, helpers, apprentices, plant clerical employees and leadmen at the Respondent's plant at Pompano Beach, Florida, excluding all other employees, including all office clerical employees, expediters, guards, professional employees and supervisors as defined in the Act.

(b) Post at its plant at Pompano Beach, Florida, copies of the attached notice marked "Appendix." 16/ Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 12, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith. 17/

3. The allegations of the consolidated amended complaint concerning the discharge of Charles McWhorter are hereby dismissed.

Dated at Washington, D. C.

Owsley Vose
Trial Examiner

16/ In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

17/ In the event that this Recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify said Regional Director, in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply herewith."

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1740

Plastiline, Inc.,

Petitioner,

v.

National Labor Relations Board,

Respondent.

ORDER DENYING PETITION FOR REHEARING

Upon consideration of the petition of Plastiline, Incorporated, for a rehearing in this case, it is

ORDERED that the said petition be, and it is hereby, denied, Judges Bryan, Russell and Young concurring in the disposition of the petition.

For the Court:

United States Circuit Judge

A True Copy, T e s t e:

Samuel W. Phillips, Clerk

By Virginia Sheppard
Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1489

PLASTILINE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not yet reported. The Board's decision and order (Pet. App. 4-38) are reported at 190 NLRB No. 75.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1972 (Pet. App. 1), and a petition

for rehearing was denied on March 21, 1972 (Pet. App. 39). The petition for a writ of certiorari was filed on May 15, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that the company refused to bargain with the union after the expiration of the certification year because it desired to avoid further dealings with the union rather than because of a reasonable doubt concerning the union's continuing majority status.

STATUTES INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at notes 3 and 4, pp. 4-5, of the petition.

STATEMENT

A. The Board's Findings of Fact

On May 13, 1969, the Board certified Broward County Carpenters District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the bargaining agent for petitioner Company's employees (Pet. App. 10). Between June and December 1969, Company and Union representatives met on thirteen occasions and ultimately reached agreement on the terms of a proposed contract (Pet. App. 23; A.

249).[1] The unit employees, however, rejected the contract on April 12, 1970.

The following day, Union President Goode informed Walter Jones, the Company's Director of Industrial Relations, of the rejection and requested a meeting with Company representatives to discuss the employees' objections to the contract (Pet. App. 23; A. 30, 156). On April 14, Jones told the Union's International Representative that he had requested Goode to present an agenda of the subjects to be discussed at a meeting and, if this was satisfactory with Company management, a meeting would be arranged (Pet. App. 23; A. 81-83). Jones added that "this was not to be construed as a negotiating meeting" (Pet. App. 23; A. 83).

On April 17, Company and Union representatives met and discussed the items on the Union's agenda (Pet. App. 24; A. 3, 33-35, 149, 216-217). At the end of the meeting, Company President Batzer stated that the Company would respond to the Union's objections to the proposed contract after consulting counsel (Pet. App. 24; A. 87-217). Despite repeated requests, the Company did not respond (Pet. App. 24; A. 89-90, 237-247).

On May 25, 1970—twelve days after the expiration of the certification year—the Company's attorney advised the Union's attorney that he had learned only that day of the employees' rejection of the contract.

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[1] "A." and "S.A." refer to the appendix and supplemental appendix, respectively, filed in the court below.

He indicated that the Company contemplated making changes in the employees' wages, hours, and employment conditions, but, before doing so, it wanted to know if the Union still represented the employees (Pet. App. 25; A. 23, 42-49). On June 1, the Union responded that it did, and requested a bargaining session on June 23 (Pet. App. 25; A. 235). The Company agreed to meet on that date, but questioned the Union's majority status and requested the presentation of proof at the meeting (Pet. App. 25-26; A. 78, 236).

The Company refused at the meeting on June 23 to bargain about its two proposed changes in working conditions unless the Union proved its majority status or would agree to do so in the near future (Pet. App. 26; A. 51-52). The Union replied that the Company was bound by the Board certification, declined to furnish fresh proof of majority status, and insisted upon bargaining (Pet. App. 26; A. 52-53). The Company stated that the meeting's sole purpose was to discuss the proposed changes and refused to bargain or to set a date for a further meeting (Pet. App. 26; A. 258-265, 275-278), asserting that it had evidence that the Union no longer had majority support (Pet. App. 26; A. 256, 259, 273).

Thereafter, the Company informed the Union that it intended to file an election petition with the Board, but offered to continue bargaining if the Union showed that it had majority support (Pet. App. 28; A. 237-247). The Union replied that no proof was necessary

in view of the certification (Pet. App. 28; S.A. 238).[2] No further bargaining occurred (Pet. App. 28; A. 239-247). In its correspondence with Union representatives, the Company ignored the Union President's repeated requests for the Company's position on contract issues, suggesting that he was not an authorized spokesman for the Union (Pet. App. 31-33; A. 239-247).

In June, July, and August 1970, the Company attempted to undermine the Union's position. It urged two leading members to persuade fellow employees to reject the Union, to support a decertification petition, and to accept an oral agreement with a Company union (Pet. App. 26-27; A. 23-28, 40-45), and offered them benefits for their aid (Pet. App. 27; 44-45, 13-16). The Company told one employee that the Union was to blame for the failure of the employees to receive certain benefits (Pet. App. 27; A. 28).

B. The Decisions Below

The Board concluded that the Company had deliberately delayed resolution of the dispute concerning a contract until after the certification year had expired. It ruled that the Company's subsequent challenge to the Union's majority status was not asserted in good faith, but instead was for the purpose of avoiding further bargaining with the Union, and

[2] The Company filed a petition on July 23, 1970 (Pet. App. 28; A. 280), which was suspended when the present unfair labor practice proceeding began (Pet. 4).

thus it violated Section 8(a)(5) and (1) of the Act (Pet. App. 34-35). The Board further held that the Company violated Section 8(a)(1) by its efforts to undermine employee support for the Union (Pet. App. 36). It ordered the Company, *inter alia*, to bargain with the Union upon request (Pet. App. 5-6, 37-38). The court of appeals enforced the order (Pet. App. 1-3).

ARGUMENT

The question stated by petitioner—whether an employer violates the Act by refusing to bargain with a union after expiration of the certification year on the basis of a reasonable doubt that the union still represents a majority of the employees—is not presented on this record. The Board found that the Company's doubt regarding the Union's majority status was not asserted in good faith, but was "part and parcel of the [Company's] scheme to avoid further bargaining with the Union" (Pet. App. 34). The court of appeals correctly concluded that "the Board's findings * * * [have] substantial support" (Pet. App. 3). The evidentiary issue thus presented does not warrant further review. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

Moreover, the evidence summarized above amply supports the Board's finding. The Company insisted that the meeting on April 17, 1970, was not an "official" negotiating session. After that meeting, the Company promised to consult its attorney and report to the Union, but, in spite of repeated requests by the

Union, it never did so. Instead, immediately following the expiration of the certification year, the Company challenged the Union's right to represent the employees (Pet. App. 25-26; A. 78, 235-247), and insisted that the Union demonstrate majority status before it would pursue negotiations. At the same time it refused to acknowledge the Union negotiators as authorized representatives and sought to persuade key employees to abandon the Union. These facts justified the Board's conclusion concerning the Company's motive in refusing to bargain.

Contrary to petitioner's assertions (Pet. 6-7), the decision below does not conflict with *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, or *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575. Although, as petitioner points out, the Court in *Brooks* indicated that an employer may refuse to bargain with an incumbent union after expiration of the certification year if it has "fair doubts" of the union's status (348 U.S. at 104), in this case the Company's expressions of doubt were not "fair" but rather were part of an unlawful scheme to eliminate a union which it disfavored. The issue in *Gissel* was "whether a union can establish a bargaining obligation by means other than a Board election" (395 U.S. at 595); the Court held that in that situation authorization cards could be relied upon to support a bargaining order if the employer had engaged in unfair labor practices which tended to preclude the holding of a fair election, and indicated that for that purpose an employer's good faith doubt

was largely irrelevant (*id.* at 614). Nothing in *Gissel* suggests that it is unnecessary to establish a good faith doubt regarding the union's continued majority before an employer may properly terminate a bargaining relationship certified by the Board.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,

NORTON J. COME,
Assistant General Counsel,

LEONARD M. WAGMAN,
Attorney,
National Labor Relations Board.

JUNE 1972.

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[8] Nor does the decision below, as petitioner asserts (Pet. 14-15), conflict with *Lodges 1746 and 743, Int'l Ass'n of Machinists* v. *National Labor Relations Board*, 416 F. 2d 809 (C.A. D.C.), certiorari denied, 396 U.S. 1058. In that case, the court denied enforcement of the bargaining order because, in its view, the employer had valid grounds for questioning the union's majority status following expiration of the certification year. The court expressly noted that there was no "independent unfair labor practice or other conduct aimed at causing disaffection from the unions" (416 F. 2d at 814). As shown, such conduct was present here.

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Supreme Court, U.S.
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JUL 27 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM — 1971

No. 71-1489

PLASTILINE, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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IN THE

Supreme Court of the United States

OCTOBER TERM — 1971

No. 71-1489

PLASTILINE, INC.,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

The National Labor Relations Board, (hereinafter called the Board), in its opposing brief in No. 71-1489 has presented certain factual aspects of this case in a manner which is misleading and incorrect when contrasted to the record as developed below. The Board in its opposing brief lays great stress upon the factual background of this case — in particular, the events which transpired subsequent to the April 12, 1970 rejection by the Company's employees of a previously agreed upon contract. This Reply Memorandum[1] is filed

[1] As used herein, Pet. App. refers to the Appendix to the Petition; A refers to the Appendix in the court below.

to correct factual misstatements made by the Board in its opposing brief and to clarify misleading factual statements in the Board's opposing brief.

The factual misstatements made by the Board in its opposing brief are as follows:

1. The Board's opposing brief at Page 4 states:

> "He indicated that the Company contemplated making changes in the employees' wages, hours, and employment conditions, but, before doing so, it wanted to know if the Union still represented the employees (Pet. App. 25; A. 23, 42-49)."

The above quotation from the Board's opposing brief refers to a May 25, 1970 letter sent by the Company's attorney to the Union's attorney (A. 234). The pertinent excerpt from the May 25, 1970 letter is as follows:

> "The Company would like to make certain changes in its wages, hours and working conditions but before doing so would like to know whether or not your organization desires to be advised of these changes and to negotiate in regard to them." (A. 234)

As the above excerpt illustrates, no mention was made in the May 25, 1970 letter of the Union's status. Rather, the Company was inquiring as to whether or not the Union desired to negotiate over certain proposed changes. The Board's statement that the Company wanted to know if the Union still represented the employees is simply not correct.[2]

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[2] It is apparent that the Board's version resulted from a reading of the Union's letter of June 1 and not the Company letter of May 25 (A. 234-235).

2. The Board's opposing brief at Page 4 also states:

> 'On June 1, the Union responded that it did, and requested a bargaining session on June 23 (Pet. App. 25; A. 235)."

The above quotation from the Board's opposing brief refers to the Union's letter of June 1, 1970. The complete text of the Union's letter is as follows:

> "The Union still represents the employees at Plastiline, Inc., and is desirous of negotiating relative to any changes in its wages, hours and working conditions.
>
> Please contact me and we will arrange to meet at a mutually convenient time." (A. 235)

As is clear from the letter and the record below, the Union in its June 1 letter never requested a bargaining session on June 23. The actual agreement to meet on June 23 was reached in a telephone conversation between Attorneys for the Company and the Union on June 18, 1970 and confirmed by a letter from the Company Attorney to the Union Attoney on that date (A. 236). The Board's opposing brief grossly distorts a material fact.[3]

3. The Board's opposing brief at Page 4 further states:

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[3] The Board's opposing brief conflicts with its brief to the Court of Appeals below — see Board's brief below, Page 7.

> "The Company refused at the meeting on June 23 to bargain about its two proposed changes in working conditions unless the Union proved its majority status or would agree to do so in the future (Pet. App. 26; A. 51-52)."

This statement in the Board's brief is totally without support in the record. Indeed, the citations in the Board's own brief to the record below indicate that at the June 23 meeting the Company attempted to negotiate over the proposed changes. The record below reflects that the Company Attorney explained the Company's proposed changes at the meeting (A. 262) and asked for the Union's comment on the changes (A. 263, 265, 271). The record below makes it quite clear that it was the Union who refused to comment on the proposed changes (A. 263, 265, 271).[4]

In addition to the factual misstatements detailed above, the Board's opposing brief contains the following misleading factual statements:

1. The Board's opposing brief at Page 4 states:

> "Thereafter, the Company informed the Union that it intended to file an election petition with the Board, but offered to continue bargaining if the Union showed that it had majority support (Pet. App. 28; A. 237-247)."

The above quotation refers to the Company attorney's letter of July 9, 1970 addressed to the Union attorney. The pertinent portion of the July 9 letter is as follows:

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[4] Again, the Board's version conflicts with its brief to the Court of Appeals below — see Board's brief below, Page 8.

> "In accordance with your request at the meeting held on June 23, 1970, we wish to advise you that it is the Company's intention to file, as stated at that meeting, a Petition for Certification. Therefore, we are in the process of getting evidence to support that Petition, and it will be filed at an early date.
>
> Although we do not believe that your client continues to represent a majority of the employees of Plastiline, Inc., in the unit for which your client was certified over a year ago, we further wish to advise you that we are prepared to negotiate in good faith with your client in an attempt to reach a contract in accordance with the law. We also must advise you, however, that any agreement reached must be conditioned upon your demonstrating to us prior to the execution of such agreement that your client, in fact, represents a majority of employees at Plastiline, Inc." (A. 237)

As the above portion of the July 9, 1970 letter indicates, the Company stated that it would negotiate to a full agreement conditioning the execution of the agreement upon the Union's proof of majority status. This must be contrasted to the Board's opposing brief which states that the Company offered to continue to bargain with the Union if it proved its majority status. The Board's version is patently misleading and finds no support in the record (A. 237). Indeed, the statement of facts in the Board's opposing brief is contrary to the statement of facts in the Board's brief to the Court of Appeals below.[5]

2. The Board's opposing brief at Page 3 states:

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[5] See the Board's brief below, Page 9.

(A. 208). The Union had previously been informed at the outset of the negotiations that the Company attorney, Alley, was the only individual authorized to negotiate a contract for the Company and that all arrangements for collective bargaining such as scheduling meetings were to be made through Alley (A. 332). In light of Goode's request, the Company attorney was contacted and upon being informed of the request reluctantly gave his approval to the proposed meeting but stressed that the employees be notified that the meeting was in no way to be construed as an official negotiating session since the Company's chief spokesman would not be present (A. 333). In addition, it was known to the Company that the authority of Goode to negotiate was limited — to be exercised only through an International Union Representative (A. 144). The meeting was held on April 17, 1970. At the conclusion of the meeting, the Company President stated that the items discussed would be taken under advisement by the Company (A. 217). Company officials then contacted attorney Alley and informed him of the results of the meeting (A. 334). In view of the prior understanding as to the nature of the meeting, Alley advised the Company to wait until contacted officially by the Union (A. 334). Alley felt that the Union, as in the past, would contact him for negotiations if the Union so desired (A. 334). The Board's opposing brief in its statement of facts intimates that the Company was attempting to forestall negotiations by refusing to construe the April 17, 1970 meeting as a negotiating session and by further refusing to contact the Union after the meeting. However, as indicated above, the Company had ample reasons for not considering the

April 17 meeting a negotiating session in that the absence of attorney Alley, the chief negotiator for the Company and the absence of Union representatives supported the Company's view that the meeting was simply a meeting between Company officials and employees to discuss why the contract was rejected by the employees (Pet. App. 23).

4. The Board's opposing brief at Page 3 states:

> "On May 25, 1970 — 12 days after the expiration of the certification year — the Company's attorney advised the Union's attorney that he had learned only that day of the employees' rejection of the contract."

This statement in the Board's opposing brief leaves the impression that the Company attorney had learned only on May 25, 1970, of the employees' rejection of the contract on April 12, 1970. Such an inference is both unfounded and illogical. The Board has seized upon the first paragraph of the Company attorney's letter of May 25, 1970, and has construed it out of context. The first paragraph of the letter is as follows:

> "I was very sorry to learn today that the union was not going to execute the contract which the negotiators had agreed to during the course of collective bargaining because the union membership had rejected the contract." (A. 234)

The Board's statement of facts is misleading in view of the evidence in the record that the Company's attorney was under the impression that the Union, despite the adverse employee vote, might still execute the contract (A. 332, 333). The Company's attorney had learned that the Union was not

going to execute the contract in a May 25 telephone conversation with the Union attorney and the letter of May 25 makes note of same. The Company attorney's letter of May 25 mentions execution, not rejection, of the contract and when so viewed is consistent with the Company's previous understanding regarding the execution of the contract.

5. The Board's opposing brief at Page 4 states:

> "The Company stated that the meeting's sole purpose was to discuss the proposed changes and refused to bargain or set a date for a further meeting (Pet. App. 26; A. 258-265, 275-278), asserting that it had evidence that the Union no longer had majority support (Pet. App. 26; A. 256, 259, 273)."

The Board's version is misleading. The Company was willing and attempted to negotiate over its proposed changes (A. 271). The Company indicated at the June 23 meeting that it was declining to set a date for future meetings because the Company attorney did not have his calendar with him (A. 276). However, at the end of the meeting, the Company's attorney, promised to contact the Union relative to future negotiations over a contract (A. 278). Consistent with this promise, the Company's attorney contacted the Union attorney by letter of July 9, 1970, and stated that the Company wanted the Union's contract proposals and suggested that the Union submit dates and times so that collective bargaining could take place (A. 237). Thus, the Board's statement indicating that the Company refused to bargain or set dates for further meetings is misleading when the record as a whole is consid-

ered. Indeed, the Company through its attorney's letter of July 9, indicated its willingness to bargain and to set future meeting dates (A. 237).

In conclusion, the factual inaccuracies in the Board's opposing brief should not be allowed to deter this Court from considering the importance and substantiality of the question raised by Petitioner.

Respectfully submitted,

Counsel for Petitioner

CERTIORARI DENIED